80-1926

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

Docket No. 80-1926

JOHN J. BOLEMAN,

Petitioner

vs.

THE CONGDON AND CARPENTER COMPANY

Respondent

BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Dominic A. Caronna
Attorney for Petitioner
Box 409
6 Jeanette Drive
Chatham, MA 02633
(617) 945-1378

Fusaro & Fusaro
332 Main Street
Worcester, MA 01608
(617) 798-3771

Question Presented

Is a suit commenced under the Age Discrimination of Employment Act (U.S.C.A., Title 29, Sec. 621, et seq.) but tried solely on the count in contract also alleged in the same complaint "involve principles the settlement of which is of importance to the public as distinguished from that of the parties?"

TABLE OF CONTENTS

	Page
Question Presented.....	i
Table of Contents.....	ii
Table of Authorities.....	iii
Other Authorities.....	iv
Preface.....	1
Respondent's Contention.....	2
Reasons for Granting the Writ.....	2
Conclusion.....	9

TABLE OF AUTHORITIES

	Page
Dick v. New York Life Insurance Co. 395 U. S. 437, 445, 447, 79 S. Ct. 921, 926, 927, 3 L. Ed. 2d 935, (1959)	6, 7
Longenecker v. G. M. Corp. 549 F 2d 1283, 1286 CA 9, (1979)	7
Maddaloni v. Western Mass. Bus Lines, Inc. Mass. App. 422 N. E. 2d 1379, 1383 (1981)	8
Mercer v. Theriot, 377 U.S. 152, 84 S. Ct. 1157, 1160, 12 L. Ed. 2d 206 (1964)	7

Other Authorities

	Page
Layne v. Bowler Corporation v. Western Well Works, Inc. 261 U. S. 387, 293 (1923)	2
Vaughan v. Chrysler Corp., D.C., Mich. 1974, 382 F. Supp. 143	5
Cooper, Directions For Directed Verdicts: A Compass For Federal Courts 1971, 55 Minn. L. Rev. 903, 921	9

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Preface

The Petition herein presented the question whether the Court of Appeals marshalled the facts most favorable to the plaintiff according to the standards of review of a Motion notwithstanding the verdict, allowing the plaintiff the benefit of all favorable and reasonable inferences. In the argument Petitioner attempted to show that the District Court did not err in submitting the case to

the jury, and particularly noted this Court's regard for the criteria in preserving jury verdicts.

The Respondent's Reply Brief presented the question whether the Court of Appeals erred in holding that the evidence did not warrant a finding of a lifetime contract. It argued in part that the plaintiff's claim was in fact no more than a dispute between the parties themselves, and of no importance to the public.

Respondent's Contention

The Respondent's position is that the Writ should not be granted because this case does not involve principles "the settlement of which is of importance to the public as distinguished from that of the parties citing Layne & Bowler Corporation v. Western Well Works, Inc., 261 U. S. 387, 293 (1923).

We maintain this position is unwarranted.

Reasons For Granting The Writ

I. The Respondent's position that the contract for lifetime employment is of no

importance to the public as distinguished from that of the parties avoids the central question in this case.

The Respondent chooses to emphasize the finding by the Appellate Court that there was "no authority" on the part of the sales manager, Mr. Cotter, to offer a lifetime contract to the plaintiff, as the sole issue. However, the crucial point underlying the question presented in the Petition is whether or not the District Court erred in allowing the case to go to the jury, which essentially raises the issue of the constitutional right to have a case go to a jury when the trial court believes that there is sufficient evidence to warrant its submission. We emphasized this point in our initial brief in connection with numerous cases noting this Court's jealous regard for the protection of jury verdicts. Indeed this is of sufficient "importance to the public" as to come within Rule 17 of the Rules of this Court and within

the purview of the Layne case.

II. A matter brought under the Age Discrimination of Employment Act is a matter of importance to the public as distinguished from that of the parties.

Since the date of the Layne decision there has been considerable legislation on socio-economic issues that were of such a constitutional, and thus "public", character as to become a matter of federal law; such as N.L.R.A., F.E.L A , Jones Act, Civil Rights, and Age Discrimination In Employment Act (U.S.C.A. Title 29, Section 621, et seq.) under which latter Act the instant case was brought, and properly retained in this Court. We note its relevancy.

Before filing this suit in the Federal Court under the above Discrimination Act, plaintiff endeavored to comply with Section 623 of the Act's requirement that filing a complaint in a state commission on discrimination shall preempt the commencement of a suit

in the Federal Court. In early 1975, plaintiff's counsel was informed by the Massachusetts Commission on Discrimination that it was not then "functioning" as usual because the Commission had been given no budget for that year, had a three-year back-log of cases, and that as a result, no one knew when, if at all, hearings would be resumed. To confirm this, this counsel met with the Commissioner who showed him that a prior discrimination case filed by the firm's client was "somewhere on the books" for more than two years. Relying on the case of Vaughan v. Chrysler Corp., D. C., Mich. 1974, 382 F. Supp. 143, counsel for plaintiff in good faith advised his client that under the circumstances outlined above, suit could still be brought directly in the Federal Court. On the defendant's Motion To Dismiss because of failure to comply with the said Section 623, the hearing Court (Skinner, J.) refused to accept plaintiff's argument, dismissed the discrimination aspect of the case, but let the cause on contract stand. We respectfully

suggest that the mere technical cutting off of the quasi-penal aspect of the discrimination claim alleged in the complaint did not strip the complaint of its "federal" character. On this posture of the case, then, we respectfully say that the instant case, in the light of all the facts and inferences it expected to reveal, retains the "public" character sufficient to bring it within the purview of Rule 17.

III. Notwithstanding the Layne case, this Court has exercised broad discretion in proceeding under Rule 17 of the Rules of this Court.

In a wrongful death action brought to this Court on the question whether a state or federal rule of the sufficiency of evidence should apply, the Court left that issue open, yet reviewed the case and reinstated the verdict for the plaintiff. Dick v. New York Life Insurance Co., 395 U. S. 437, 445, 79 S. Ct. 921, 926, 927, 3 L. Ed. 2d 935 (1959).

In another case involving the same question of the sufficiency of evidence, the Court said that "The evidence was sufficient under any standard which might be appropriate- state or federal." Mercer v. Theriot, 377 U. S. 152, 84 S. Ct. 1157, 1160, 12 L. Ed. 2d 206 (1964), (citing the Dick case). The Court generously touched upon the Court proceedings and found that "the trial judge conducted the trial with scrupulous regard for the litigant's rights." (cf. Longnecker v. G. M. Corp., 549 F 2d 1283, 1286, CA 9, (1979); Dick vs. New York Life Insurance Co. (supra) 359 U. S. 437, 447 (1979).

The above instances show that since the Layne case, and under Rule 17, this Court has exercised broad discretion in reviewing matters where the petition for certiorari did not conspicuously involve "a matter of importance to the public...", but the Court decided to review the case in any event.

Of special interest to this Court may be a case that appears to parallel the instant

case in which the Appeals Court of Massachusetts recently decided that "in every contract there exists an implied covenant of good faith and fair dealing." Maddaloni v. Western Mass. Bus Lines, Inc., Mass. App. 422 N. E. 2d 1379, 1383, (1981). It also decided the reliability of determining future damages. Thus the Court reduced to writing the public character that was always implicit in every contract of employment, and certainly implicit in all of the Federal Statutes on Labor, Employment, Discrimination, Civil Rights, etc.

Lastly, and as a post-script to the Mercer case (supra) and this Court's regard for a lower court's treatment of a case, we add a note that might properly have appeared in the initial brief.

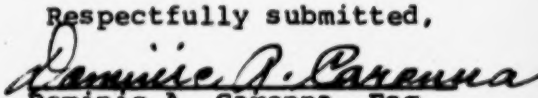
In the instant case the trial judge permitted the jury to take notes in the course of the trial, had them sealed overnight, and gave the jury copies of the outline of his charge, (Record Exhibit pp. 208, 209). Thus the "probability" that six jurors could mis-

understand or happily ignore the law" was far less likely than in the ordinary case, thus minimizing the "measure of speculation and conjecture" that the Supreme is wont to allow in any event. (cf. Cooper, Directions For Directed Verdicts: A Compass for Federal Courts, 1971, 55 Minn. L. Rev. 903, 921).

CONCLUSION

We respectfully suggest that the instant case goes far beyond the mere factual interest between the parties only. It is clothed with the public regard for "good faith and fair dealing" as recently decided Thus, we respectfully pray that this Court will grant the Petition and have the opportunity to view all of the "considerations which emerge after full briefing and oral argument."

Respectfully submitted,



Dominic A. Caronna, Esq.
Box 409, 6 Jeanette Drive
Chatham, MA 02633
945-1378